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Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN M. MERRETT, and CECILIA A. CLAYTON, as personal representative of the estate of SOLOMON CLAYTON, JR., on their own behalf and on behalf of all others similarly situated, PETITIONERS

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement, ROBERT DEMPSEY, individually FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles, ROBERT BUTTERWORTH, and LAWRENCE CROW, JOHN M. ERWIN, and JERALD VAUGHN, CITY OF LAKELAND POLICE DEPARTMENT, CITY OF MAITLAND POLICE DEPARTMENT, and CITY OF LARGO POLICE DEPARTMENT, RESPONDENTS

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a roadblock established on the pretext of ensuring compliance with traffic related laws, but admittedly designed to intercept illegal drugs, is unreasonably pretextual and therefore unconstitutional.

2. Whether a roadblock established for the admitted purpose of intercepting illegal drugs by subjecting all passing motorists to sniffs by canines and causing substantial delays and hardships to motorists is unreasonable and therefore unconstitutional under the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979).

3. Whether a motorist in a line leading up to a roadblock is "seized" under the Fourth Amendment, where a law enforcement officer in a patrol car is visibly positioned to, and does, chase down motorists who leave the line, and subjects the motorists to license checks and a canine sniffs.

4. Whether canine sniffs establish probable cause to search where the canines incorrectly signaled the presence of drugs in 27 of 28 instances.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

John M. Merrett, Plaintiff/Petitioner

Estate of Solomon Clayton Jr., as represented by Cecelia A. Clayton, Plaintiff/Petitioner

Certified class of motorists who were subject to the roadblocks at issue, Plaintiffs/Petitioners

James T. Moore, Commissioner for Florida Department of Law Enforcement, Defendant/Respondent

Robert Dempsey, Defendant/Respondent

Leonard Mellon, Executor Director of Florida Department of Highway Safety & Motor Vehicles, Defendant/Respondent

Lawrence Crow, Chief of Police, City of Lakeland, Florida, Police Department, Defendant/Respondent

Robert Butterworth, Defendant/Respondent

Fred O. Dickinson, Defendant/Respondent

Jerald Vaughn, Chief of Police, City of Largo, Florida, Police Department, Defendant/Respondent

John M. Erwin, Chief of Police, City of Maitland, Florida, Police Department, Defendant/Respondent

City of Lakeland, Florida, Police Department, Defendant/Respondent

City of Largo, Florida, Police Department, Defendant/Respondent

City of Maitland, Florida, Police Department, Defendant/Respondent

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals below is found at *Merrett v. Moore*, 58 F. 3d 1547 (11th Cir. July 25, 1995) (App.1-13), rehearing denied with opinion on January 9, 1996 (App.14), rehearing *en banc* denied with three dissents, *Merrett v. Moore*, Eleventh Circuit Slip Opinion at 1322 (11th Cir. February 26, 1996) (App.15-24).[1]

JURISDICTION

The order below was entered on July 25, 1995, with rehearing denied on January 9, 1996. This Court has jurisdiction to review the order below by writ of certiorari by reason of 28 United States Code Section 1254(1).

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[1] Copies of the district court opinions granting summary judgment to Respondents and dismissing Petitioner's claims have been lodged with the Clerk.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The undisputed facts and the disposition of the case in the district court were set out in the opinion of the Eleventh Circuit (App. 1-13). We will quote those matters below, adding footnotes where necessary to supply additional facts or explanations:

> This case requires us to consider when, consistent with the Constitution, a state may establish roadblocks for the chief purpose of locating illegal drugs.
>
> * * *
>
> From 1982 through 1984, the Florida Department of Law Enforcement (FDLE) developed a series of operations intended to intercept illegal drugs on state highways. As part of the operation, FDLE officials proposed to set up temporary checkpoints along highways to stop all traffic and expose the cars to narcotic sniffing dogs. Because the FDLE has no authority to establish roadblocks, it asked for the assistance of the Florida Highway Patrol (FHP) to set up drivers' license checkpoints.[2]

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[2] FDLE officials had been advised by their counsel that its original plan to conduct drug roadblocks would likely be struck down by the Courts, but that if the operation occurred in conjunction with a driver's license roadblock conducted by a traffic authority such as the FHP, such an operation *may* be less problematic. However, FDLE's counsel expressed "grave

FDLE officials also requested the assistance of K-9 units, each consisting of a narcotic sniffing dog and its handler, from the cities of Maitland, Lakeland, and Largo, Florida.

The joint operation plan, entitled "Interdiction of Illegal Narcotics, North Florida," called for roadblocks from 4:00 p.m. until 10:00 p.m. on January 11 and 12, 1984, at specific sites on four Florida highways near the Georgia state line.[3] Six FHP troopers, one FHP investigator, five FDLE troopers, and four or five K-9 units were assigned to each site.[4] . . . The FHP troopers were responsible for traffic control and for stopping vehicles, checking obvious safety defects, and examining drivers'

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reservations about the overall scheme." R-6-122-0. Nevertheless, FDLE officials contacted FHP officials and asked them to establish driver's license roadblocks so as to justify FDLE's desire to stop all passing motorists to expose them to drug dogs. FHP complied.

[3] Several of these "highways" were busy commuter roads, such as U.S. 319, which is the only direct route connecting the sister cities of Tallahassee, Florida, and Thomasville, Georgia.

[4] Other law enforcement also participated. For example, an officer of the Florida Game & Freshwater Fish Commission used the occasion to check motorists for hunting violations. He required some motorists to open coolers for his inspection. Local deputy sheriffs were also present and, in some cases, motorists were questioned about their ownership of property in their vehicles. For example, one class member was detained until he could establish that stereo equipment in his trunk was not stolen.

licenses and vehicle registrations. They were instructed to stop all traffic passing through the roadblocks until traffic became congested, in which case vehicles were to be waved through as necessary to a oid long backups.[5]

The dog handlers were told that the outside of each car was to be sniffed by the dogs[6] as FHP troopers checked the driver's license and vehicle registration. If a dog alerted to the presence of drugs or if license or registration problems were found, the car was directed to a location out of the flow of traffic.[7] In the case of a dog alert, a second dog was supposed to check the outside of the car.[8] If the second dog alerted, consent to search was requested; and, if refused, the driver was detained until a search warrant was obtained. FDLE agents worked with the dog handlers and were responsible for making decisions about vehicle searches if a dog alerted to the presence of drugs.

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[5] These instructions notwithstanding, long backups occurred.

[6] Although the dogs generally sniffed immediately "outside" the vehicle, the contents of the vehicles, *including the passengers*, were the subject of the sniff.

[7] This also occurred where an officer suspected other illegal activity, such as a hunting violation or thought property in the vehicle might be stolen. *See* note 4, *supra*.

[8] This only occurred sometimes.

> Other teams – each consisting of an FDLE agent, an FHP trooper, and K-9 unit – were directed to walk around vehicles parked in nearby rest areas and truck stops. If the dogs alerted, the driver was to be located and asked for consent to search. . . .
>
> During the two day operation, approximately 2100 vehicles passed through the roadblocks of which roughly 1330 were stopped. With the vehicles checked by teams at the rest areas and truck stops, approximately 1,450 vehicles were sniffed by the dogs. The dogs alerted to 28 vehicles; and, after a full search, only one person was arrested for possession of illegal narcotics.[9] In addition, law

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[9] Despite the fact that only one (1) of the 28 vehicles to which the dogs alerted contained any illegal drugs, these individuals were all subject to extensive delays, often lasting more than an hour, and their vehicles were subject to extensive searches. The explanations for the false alerts on 27 of 28 cases include foreign environmental conditions, health, and weariness and attitude of the dogs, all of which affect their abilities. Moreover, because these dogs react to *an odor* rather than *a substance*, they are incapable of distinguishing an odor emanating from the present presence of an illegal drug from an odor emanating from the past or present presence of a legally prescribed drug containing a component similar to an illegal drug, the odor remaining from the past presence of an illegal drug, or odors from several other substances with which the occupant may have had contact. Also, U.S. currency on the person of an occupant may cause an alert. In *United States v. Six Hundred Thirty-Nine Thousand Five Hundred*

enforcement officials issued sixty-one vehicle-related citations.

At the roadblocks, the actual encounter with the officers conducting the drivers' license checks lasted a few minutes. And, the dogs usually were able to sniff the exterior of the cars before the license and registration checks were completed. So, most people experienced only a slight delay. But, during rush hours, traffic backed up; and some people waited thirty to forty-five minutes before arriving at the roadblock or being waved through.[10] In general, vehicles were permitted to leave the

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Fifty-Eight Dollars ($639,558.00), 955 F.2d 14 (D.C. Cir. 1992), an expert testified that ninety percent (90%) of all cash in the United States contains sufficient quantities of cocaine to alert a trained dog. One study indicates that up to ninety-seven percent (97%) of all bills in circulation in this country are contaminated by cocaine. Crime and Chemical Analysis, 243 Science 1554, 1555 (1989); *see also United States v. $80,760.00 in United States Currency*, 781 F.Supp. 462, 475 at n.32 (N.D. Tex. 1991), aff'd, ____ F.2d ____ (5th Cir. 1992).

[10] The delays to motorists were somewhat more extensive than was set out by the court below. As the district court found, *many* people experienced delays of 30 minutes or more. R-9-209-4. Estimates of the average wait varied from 20 minutes to an hour, and most motorists could not escape enduring only the several minutes of delay experienced at the actual checkpoint. FDLE officials estimated delays of 30-35 minutes while a television reporter estimated average delays in excess of 30 minutes. Class members reported delays ranging from 30 minutes to more than an hour. R-6-117-32-33.

lines approaching the roadblocks and to turn around, but not without first being stopped by a trooper and having their registrations and drivers' licenses checked.[11] Still, in at least one instance, a driver was instructed to remain in line.

People whose vehicles were actually searched experienced longer delays. In addition, one car overheated; one minor accident occurred; the dogs scratched several cars; and one person was bitten by a dog.[12]

Plaintiffs, a class of motorists stopped at the roadblocks, brought suit against state and local officials

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[11] Very few people turned around and tried to leave and those that did so were subject to the same checks as those who passed through the checkpoint. Indeed, any attempt to leave could have been construed to constitute the misdemeanor of "fleeing an officer." *See* Section 316.1935, Florida Statutes (1995). Moreover, alternative routes would have required many hours of additional travel, so those who turned around likely had to cancel their travel plans.

[12] The magnitude of the disruption of class members' lives and the humiliation they experienced was not fully set out by the panel. In one case, a class member was delayed for hours while his 8½ month pregnant wife had left her workplace and awaited his arrival on a street corner in a bad neighborhood, unable to contact her husband. The dog alert to his vehicle was later attributed to aspirin. In another case, a dog scratched wildly at a car door while an elderly invalid woman was terribly frightened. The dog was later placed in the car and sniffed about the person of this woman. One man was bit, cars were scratched, and a number of persons expressed fear of the dogs.

involved in the operation. Plaintiffs say the checkpoints violated their Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures.[13]

* * *

The district court disposed of the case through a series of orders.[14] First, the court dismissed the claim against the police chiefs and their city police departments on the grounds that the chiefs had not "knowingly conspired" to violate plaintiffs' rights and that the facts did not support imposing municipal liability. Next, the court addressed the merits of plaintiffs' constitutional claims and concluded that the operation, as planned, violated no constitutional rights. In a later order, the court granted defendants Butterworth and Dempsey qualified immunity on the grounds that, at the time of the roadblocks, it was not clearly established that the operation violated plaintiffs' constitutional rights. The court also dismissed the

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[13] Plaintiffs sought damages, as well as declaratory and injunctive relief because Defendants threatened that such operations "will continue to be implemented on an intermittent and unpredictable basis...".

[14] Copies of the orders of the district court have been lodged with the Clerk.

> claim against Moore and Dickinson because the planned operation did not – and in the future will not – authorize unconstitutional conduct.

An appeal to the Eleventh Circuit Court of Appeal followed, and on July 25, 1995, the panel affirmed the district court and generally adopted its reasoning. *Merrett v. Moore,* 58 F. 3d 1547 (11th Cir. 1995)(App. 1-13). Rehearing was denied with an opinion on January 9, 1996 (App. 14). Rehearing *en banc* was denied with the published opinion of three dissenters on February 26, 1996. *Merrett v. Moore,* Eleventh Circuit Slip Opinion at 1322 (App. 15-24).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With *U.S. v. Morales-Zamora*, 974 F. 2d 149 (10th Cir. 1992) and Respondents and the Court Below Have So Acknowledged

Respondents concede that the case at bar is factually indistinguishable from *U.S. v. Morales-Zamora*, 974 F. 2d 149 (10th Cir. 1992).[15] Moreover, the panel explained that it was aware that "the Tenth Circuit reached a different result in a somewhat similar case: *Morales-Zamora*," but explained that "we were not persuaded by that opinion." App. 14. Still further, the dissenters in the denial of rehearing *en banc* also found *Morales-Zamora* to be factually indistinguishable, writing that in *Morales-Zamora*, the Tenth Circuit was "considering a roadblock identical to the ones before us . . ." App. 18. The acknowledgments by Respondents, the panel and the *en banc* dissenters that this case directly conflicts with the decision of another circuit is strong evidence of this direct conflict.

An examination of this opinion in *Morales-Zamora* also shows the direct and intolerable conflict with the decision below. In both the case at bar and in *Morales-Zamora*, drivers' license roadblock checks were used as a pretext for subjecting all motorists on busy highways to canine sniffs for drugs. Clearer conflict among the circuits could hardly exist: the Tenth Circuit condemned this practice as violative of the Fourth Amendment; the Eleventh Circuit endorsed the practice. This direct conflict, of course, is a well-

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[15] Respondents so conceded at oral argument before the Eleventh Circuit. Moreover, their brief to the Eleventh Circuit did not attempt to distinguish *Morales-Zamora*, but argued that the case should not be followed. *Respondent's Brief* at 10.

established basis for the granting of certiorari review. *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982); *U.S. v. Lorenzetti*, 467 U.S. 167 (1984).

Not only does the decision below conflict with the decision of the Tenth Circuit, but it also conflicts with persuasive dicta in *Texas v. Brown*, 460 U.S. 730 (1983). Although the court below purports to have exempted roadblock cases from pretext analysis, this Court had made it clear in *Texas v. Brown* that the pretext doctrine applies in roadblock settings. The *en banc* dissenters below, relying in part on *Morales-Zamora*, explained the conflict of the decision below with this Court's opinion in *Texas v. Brown*:

> In *Texas v. Brown*, 460 U.S. 730 (1983), the Court reviewed a decision where a court had suppressed evidence seized at a roadblock on the ground that the officer had to change his position in order to see the evidence, allegedly rendering the plain-view doctrine inapplicable. *Id.* at 734-35. Holding that the plain view doctrine did apply, the Court emphasized that there was "no suggestion that the roadblock was pretext whereby evidence of [a] narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." *Id.* at 743; *see also South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (upholding inventory search because "there is

no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive").

As the Tenth Circuit explained in *Morales-Zamora,* [*supra*], when considering a roadblock identical to the ones before us, "[i]t would seem to follow [from the opinion in *Texas v. Brown,*] that had the roadblock [there], which was designed to check for driver's licenses and registration, been but a pretext to look for "plain view" evidence of more serious crimes, the seizure of the [evidence] would have constituted a violation under the Fourth Amendment." *Id.* at 152. Applying *Brown*, the court reasoned as follows: "[h]aving concluded that the primary reason for the roadblock stop of Zamora's car was not to check her driver's license, but to ascertain, with the aid of an ever-present sniffing canine, whether she possessed drugs, it follows that the stop was pretextual and all that occurred thereafter was tainted." *Id.* at 153.; *see also* [*U.S. v.*] *McFayden*, 865 F.2d at 1312-13 [(D.C. Cir. 1989)] (observing that driver license roadblock could be conducted in a way indicating that its principal purpose was to detect

> crimes unrelated to licensing, in which case "a subterfuge might result in an infringement of Fourth Amendment rights.").

App. 19.

The conflict created by the decision below with its sister circuit and with this Court's precedents is intolerable because it turns decades of "pretext" jurisprudence on its head. This Court has consistently condemned Fourth Amendment searches and seizures based upon pretextual motives at least since the time of *U.S. v. Lefkowitz*, 285 U.S. 452 (1932), noting that the pretextual use of police power raises a problem of constitutional magnitude. *U.S. v. Robinson*, 414 U.S. 218 (1973); *see Texas v. Brown*, 460 U.S. 730 (1983); *Colorado v. Bannister*, 449 U.S. 1, 5 n.4 (1980). Until now, lower courts have also unanimously condemned pretextual roadblock and traffic stops. *E.g., U.S. v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992); *U.S. v. Ozuna-Fuentes*, 773 F.Supp. 1495 (D.N.M. 1991); *Garrett v. Goodwin*, 569 F. Supp. 106, 119 (E.D. Ark. 1982); *U.S. v. Smith*, 799 F.2d 704 (11th Cir. 1986); *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992, 996, 996 (Ariz. 1983); *Myricks v. United States*, 370 U.S. 901 (5th Cir. 1967) (upholding safety check roadblock where "not done as subterfuge or ruse"); *State v. Smith*, 647 P.2d 562 (Okl. 1984); *McReynolds v. State*, 441 So.2d 1016, 1019 (Ala. 1983); *State v. Baldwin*, 473 A.2d 522, 526-27 (N.H. 1984).

In explaining the intolerable conflict that the court below created with existing "pretext" case authorities, the *en banc* dissenters wrote:

Under our longstanding precedent . . . when a law enforcement officer stops a car on the basis of a traffic violation to investigate the possibility that the car is carrying drugs, the stop is unconstitutional if a reasonable officer *would not have made the traffic stop* in the absence of the illegitimate motive. *See, e.g., United States v. Valdez,* 931 F.2d 1448, 1451 (11th Cir.1991); *Amador-Gonzalez v. United States,* 391 F.2d 308, 313 (5th Cir. 1968).

In this case, the government conceded that it would not have established the roadblocks absent its desire to intercept drugs. The panel, however, finds our pretext cases inapplicable because they involved roving rather than roadblock stops. The panel reasons that because "one officer's individual discretion does not affect the determination of who is stopped [at roadblocks] . . ., the pretext analysis, as set out in our [roving patrol] precedents, does not fit . . . ." *Merrett,* 58 F.3d at 1550 n.2.

Police officer discretion is not the primary concern of our pretext cases, however. While these cases recognize the danger posed by the discretion exercised by officers on roving patrol, they are grounded on

> the more fundamental concern that officers will attempt to evade the requirement of the Fourth Amendment by using a traffic stop to detain someone for a purpose that would not lawfully support a detention. In both cases, "the police engage [ ] in a deliberate scheme to evade the requirements of the Fourth Amendment. . . ." *Amador-Gonzalez*, 391 F.2d at 314 (quotation omitted).

App. 18.

As the *en banc* dissenters point out, the decision below attempts to distinguish pretextual roadblocks from pretextual stops by individual police officers because these roadblock stops were ordered by an agency head rather than a lone officer in the field. App. 18. However, whether the pretext is engaged in by an agency head who seeks *to evade the Constitution* or an officer in the field who seeks to *evade the Constitution* seems irrelevant to the pretext question. Indeed, the fact that the pretext here was committed at the State's highest policy level does not excuse such conduct – *it makes it far worse*. When a rogue policeman engages in a pretextual stop in violation of the Constitution and this Court's rulings through subterfuge, such actions are offensive, but can be often be attributed to poor training or "a bad cop" who is an exception to the rule. When, however, a high-ranking governmental official orders his subordinates to engage in conduct deliberately designed to evade the Constitution and this Court's rulings, such actions are far more constitutionally offensive than the unauthorized act of a

single police officers.

In this time of growing public distrust of government, the decision below hands government carte blanche to violate the law through pretext. It is no wonder that the public distrusts our government when the public is expected to live by the law but the court below winks and gives the government the green light when the government engages in a deliberate scheme to circumvent the law. This problem is all the worse when the governmental officials who engage in evasion of the law are the very same officials who we trust to fairly enforce the law.

Thus, the court below created irreconcilable conflict with its sister circuit and with the long standing precedents of this Court. This conflict is rendered intolerable because it turns all existing jurisprudence on this issue on its head, because of the number of persons affected and to be affected by the decision of the court below[16] and because of the severity of the decision's offensiveness to our cherished Fourth Amendment. Review by certiorari to resolve this conflict on these important issues is appropriate.

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[16] Over 2,000 people were affected by this operation alone. The "Checkpoint Charlie" scenario made possible by the court below has the potential to affect millions of citizens.

II. The Questions Presented Are Important Questions Of Federal Constitutional Law Which Should Be Settled By This Court

Each of the questions presented herein raises issues of exceptional importance. The overall importance of the issues presented was described well be the *en banc* dissenters of the Eleventh Circuit. They explained that the decision below

> makes us the first circuit court in the country to legalize roadblocks to intercept illegal drugs. Such a case deserves careful consideration by the entire Court.

App. 16.

Because the *en banc* dissenters described the importance of the issues more eloquently than can counsel, we quote from their opinion to explain the importance of those issues:

> Heretofore, federal courts have allowed very few exceptions to the Fourth Amendment requirement that law enforcement officers possess at least articulable suspicion before stopping a vehicle: namely, at fixed checkpoints near border crossings to preclude illegal immigration, *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976); and at fixed and temporary checkpoints to ensure compliance with *traffic-related laws*, such as driver's license, vehicle registration and drunk driving laws, *see Michigan*

Dept. of State Police v. Sitz, 496 U.S. 444 (1990); *U.S. v. McFayden*, 865 F.2d 1306, 1313 (D.C. Cir. 1989).

This case, however, upholds temporary, unannounced roadblocks established on the pretext of ensuring compliance with traffic-related laws, but admittedly designed to intercept illegal drugs. . .

During prohibition seventy years ago, the Supreme Court observed that "it would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile *on the chance of* finding liquor. . . " *Carroll v. U.S.*, 267 U.S. 132 (1925). In my view, permitting law enforcement officers to stop every vehicle at a roadblock based on the mere possibility that one or more vehicles passing through will contain illegal drugs – evidence of a crime completely unrelated to highway safety – is similarly intolerable and unreasonable.

App. 16-17. Indeed, by failing to balance *all* of the interests – including the purpose of the roadblock – the Court below has written out of the law the principle that "an intrusion must be reasonably related in scope to the justification for commencing it." *Florida v. Royer*, 460 U.S. 491 (1983); *Warden v. Hayden*, 387 U.S. 294 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968).

Turning to the importance of the specific questions presented herein, the first question raises the issue of whether state officials may engage in pretext to evade clearly settled constitutional prohibitions. The exceptional importance of that issue was discussed in the preceding section of this petition. At its heart, this issue involves the question of whether the Court will condone admitted and deliberate evasion of the law by law enforcement. Surely, such a weighty issue is deserving of review by this Court.

The second question raises the issue of whether a roadblock established for the admitted purpose of intercepting illegal drugs by subjecting all passing motorists to sniffs by canines and causing substantial delays and hardships to motorists is unreasonable and therefore unconstitutional under the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979). This issue, too, is quite important. As the *en banc* dissenters explained:

> in determining the reasonableness of the roadblock seizures, the panel does not consider *all* of the circumstances surrounding the seizures. Instead, it focuses exclusively on the driver license and vehicle registration aspects of the roadblocks. . . . By ignoring the primary purpose of the roadblocks – intercepting illegal drugs – and the effectiveness of the roadblocks in serving that purpose, the panel, in my view, fails to engage in a meaningful balancing under *Brown* and *Skinner*, and *loses sight of the historical concern with protecting*

> *citizens from wholesale governmental searches and seizures in the absence of probable cause or reasonable suspicion.*

App. 19 (emphasis supplied). The decision below has consequences far beyond its printed words: it authorizes any form of "Checkpoint Charlies" that law enforcement may choose to establish, so long as law enforcement simultaneously checks driver's licenses. Routine roadblocks in high crime areas to check for general evidence of crime are authorized by the decision below so long as the officers also check driver's licenses. Similarly, stops and inspections of all motorists leaving mall parking lots for evidence of shoplifting is also permissible, so long as driver licenses are checked. Such operations are authorized under the panel's analysis *regardless of their effectiveness and regardless of the hardships they may cause motorists.* As the *en banc* dissenters wrote:

> In my view, this opinion comes perilously close to permitting unfettered government intrusion on the privacy interests of all motorists.

App. 20. This virtually unfettered intrusion into Americans' privacy interests which is now permitted in the Eleventh Circuit is a weighty and important issue deserving of this Court's attention.

Indeed, the hardships caused motorists in this operation which went largely ignored in the court's analysis were constitutionally substantial. The court below acknowledged that many motorists were subjected to lengthy delays, but did not adequately acknowledge or weigh the disruption of class members' travel plans and

the many anecdotes involving dog bites, scratched cars, and motorists who were humiliated or put in fear. These interests have previously been considered important by this Court.

For example, this Court has given significant consideration to the disruption of travel plans when engaging in Fourth Amendment balancing. In *U.S. v. Place*, 462 U.S. 696 (1983), this Court held that the sniffing of luggage in an individual's custody at an airport was a seizure because it interfered with the individual's "liberty interest in proceeding with his itinerary":

> [I]n the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as the liberty interest in proceeding with his itinerary . . . [S]uch a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return. Therefore, when the police seize luggage from the suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause.

Inadequate – if any – weight is given to this important interest in the analysis conducted by the court below.

Nor does the court below meaningfully consider the fact that this operation also subjected many innocent people to fear and humiliation by forcing them to undergo inspection of their vehicles and contents – *including the occupants* – by large dogs. Although this Court has generally approved the use of canines to sniff for drugs – generally upon reasonable suspicion – it has never before upheld the use of canines to stop and sniff people *without any suspicion. See U.S. v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), *cert. denied sub nom Fisher v. U.S.*, 106 S.Ct. 66 (1986)(dog sniff outside of an individual's apartment was a search requiring Fourth Amendment justification); *Lowery, The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229, 1246-47 (1983) ("the very act of being subjected to a body sniff by a German Shepherd may be offensive at best or harrowing at worst to the innocent sniffee"). The significance of this intrusion is amplified by the unreliability of the dogs. The undeniable fact is that these dogs were correct in but 1 of 28 instances because they will alert to odors which may or may not correspond to the presence of drugs.[17]

As Judge Reinhardt wrote in *U.S. v. Dicesare*, 765 F.2d 890 (9th Cir. 1986):

> [T]he critical question in every fourth amendment case is whether the intrusion at issue is one that a free society is willing to tolerate. There can be no question that a substantial difference exists between a peace officer, on whom

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[17] This is particularly problematical when much of our U.S. currency is contaminated by trace amounts of cocaine. *See* note 9, *supra*.

we have conferred the law enforcement authority of the state and who is at least familiar with the rudiments of fourth amendment protections, and a dog. A peace officer is clearly capable of conducting himself with the bounds of the Constitution if he wants to do so. It is, of course, unreasonable for us to expect a dog, even one trained by our finest police or customs officials, to appreciate the finer contours of the fourth amendment.

That trained canines may act merely as "instruments" of investigating officers does not, in my view, diminish the offensive character of the intrusion. History is replete with incidents in which dogs, acting as instruments of the state, have invaded people's rights in furtherance of the state's interest. In the antebellum South, dogs were used to ferret out blacks who sought little more than the same "free society" that the Fourth Amendment protects. During World War II, dogs were used in Nazi Germany to help locate Jews so that they could become a part of Hitler's "Final Solution". Although the state of affairs has changed somewhat since these events transpired, the image

> of the police state is as clear now as it was then.

Thus, neither the purpose of the roadblock, its effectiveness in achieving its primary goal, nor many important interests of class members were weighed by the court below. The result was the application of a balancing test where the weights on one side of the scale had their inner cores removed before the balancing began. There was then no *real* balancing, as required by *Brown v. Texas, supra*. This radically new approach to the balancing test raises an issue worthy of this Court's review.

The third important issue raised by this petition is whether a motorist in a line leading up to a roadblock is "seized" under the Fourth Amendment, where a law enforcement officer in a patrol car is visibly positioned to, and does, chase down motorists who leave the line, and subjects the motorists to license checks and canine sniffs. The court below held that the ability to turn around and be subjected to a license check and dog sniff somehow makes the encounter something less than a seizure. However, as the *en banc* dissenters wrote, "freedom to leave the line means freedom to leave the line without being stopped." App. 20.

Motorists were seized by these roadblocks because a reasonable person would believe that he or she was not free to leave. This has always been the test of whether a person is seized for purposes of the Fourth Amendment. *U.S. v. Mendenhall*, 446 U.S. 544 (1980).

Regardless of whether a motorist could theoretically turn around (and still be subject to the roadblock checks), there was no *real* freedom to leave because most motorists had important destinations to reach and

there was no other way to get there but wait it out. Mr. Merrett, for example, was not about to leave his 8½ month pregnant wife waiting on a street corner while he turned around and went home. Moreover, it is a criminal offense in Florida to attempt to flee once lawfully stopped by law enforcement.[18] Also, common sense tells us that a reasonable person, *forced* to come to a stop by the authority of law enforcement officers, would not believe that he is free to turn around and avoid the apparently lawful command. Such a belief was reinforced by the presence of the "chase" car, designed to stop anyone who tried to leave. Perhaps the best indication that class members felt that they were required to wait is that only a handful even attempted to turn around, and at least one of those was made to get back in line. Class members, like the officers, are well aware that if they were to attempt to turn around, it would be presumed that they had committed a criminal offense, which could result in additional delays and searches.

The Fourth Amendment's prohibition on unreasonable seizures has at its heart the prohibition on government's unreasonable interference with the freedom of movement. *E.g., Brower v. City of Inyou,* 489 U.S. 593, 597 (1989). In *U.S. v. Martinez-Fuerte,* 428 U.S. 543, 557 (1976), this Court explained that the Fourth Amendment embraces a motorist's right to "free passage without interruption." These important interests are at stake in this case. The determination of the court below that persons subject to roadblocks are not "seized" is a direct affront to the continued existence of a motorist's right to "free passage without interruption." Indeed, the decision below seriously alters the entire

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[18] See Section 316.1935, Florida Statutes (1995).

heretofore well-settled definition of the term "seizure" in Fourth Amendment jurisprudence.

Finally, this petition raises the issue of whether canine sniffs establish probable cause to search where the canines incorrectly signaled the presence of drugs in 27 of 28 instances. This Court has always *assumed* that canines are accurate because the cases usually reach the courts following a successful canine search. However, this is not the first time where factual scenarios have called into question whether canine sniffs give rise to probable cause. The 4% success rate here is nowhere close to "probable". *See U.S. v. Brown*, 731 F.2d 1491, 1492 n.1 (11th Cir. 1984); *Horton v. Goose Creek Independent School District*, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) ("if a dog alerts a hundred times and there is no contraband on ninety of those occasions (a success rate of 10%), then an alert conceivably might not arouse a reasonable suspicion").

This issue is important because Respondents have promised to repeat this operation and, with the blessings of the court below, law enforcement around the country is likely to adopt these tactics, potentially affecting millions of citizens. Based on evidence which proved to be little more reliable than a divining rod, these millions of Americans are subject to extensive searches by governmental officials. In the case of 27 innocent class members below, every crevice of their vehicles were checked, their personal belongings were carefully examined, small containers within their vehicles were examined, and sometimes, they were patted down and asked to empty their pockets. R-6-122-L. The important question concerning the evidence necessary to justify such a major intrusion into citizens'

lives is worthy of consideration by this Court.

The importance and constitutional magnitude of this entire case was explained well in *State v. Smith*, 674 P. 2d 562, 564-65 (Okl. 1984), referring to another roadblock:

> The Court finds such activities by law enforcement authorities, while commendable in their ultimate goal . . . draw dangerously close to what may be referred to as a police state. Here, the state agencies have ignored the presumption of innocence, assuming that criminal conduct must be occurring on the roads and highways, and have taken an 'end justifies the means' approach . . . [A] basic tenet of American jurisprudence is that the government cannot *assume* criminal conduct in effectuating a stop such as the one presented herein. Were the authorities allowed to maintain such activities as presented in this case, the next logical step would be to allow similar sops for searching out other types of criminal offenders. For example, it is well known to the public that shoplifting is an everyday occurrence which constantly plagues merchants in Oklahoma and elsewhere. Are law enforcement authorities then to be allowed to establish fixed checkpoints, permanent or

> otherwise, outside of every shopping center in the area to question all exiting shoppers as to whether they possess sales receipts? Are law enforcement authorities to be allowed to demand all shoppers to produce such receipts or be subject to arrest every time they go shopping? The potential for abuse is apparent.

As the *en banc* dissenters wrote, the decision below

> makes us the first circuit court in the country to legalize roadblocks to intercept illegal drugs. Such a case deserves careful consideration by the entire Court.

App. 16. Petitioners agree.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

EDWARD S. STAFMAN
Counsel for Petitioners

APRIL 1996

APPENDIX

TO

PETITION OF WRIT OF CERTIORARI

United States Court of Appeals,
Eleventh Circuit.

No. 93-2510.

John M. MERRETT,
Solomon Clayton, Jr., Cecelia A. Clayton,
Plaintiffs-Appellants,

v.

James T. MOORE, Commissioner, FDLE, Leonard Mellon, Exec. Director, Florida Dept. of Highway Safety & Motor Vehicles, Lawrence Crow, Chief, Lakeland Police Dept., Jerald Vaughn,
Defendants-Appellees.

July 25, 1995.

Appeal from the United States District Court for the Northern District of Florida. (No. TCA 84-7198-WS), William Stafford, Judge.

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

This case requires us to consider when, consistent with the Constitution, a state may establish roadblocks for the chief purpose of locating illegal drugs. This case arose out of roadblocks that Florida law enforcement officials established along state highways. Plaintiffs brought suit under 42

U.S.C. § 1983 claiming that their Fourth and Fourteenth Amendment rights were violated when their vehicles were stopped, sniffed by dogs, and in some cases, searched at these roadblocks. Because the roadblocks, as planned by defendants, were not unconstitutional, we affirm the district court's orders granting summary judgment against plaintiffs' claims.

Briefly stated, the undisputed facts of this case are as follows.[19] From 1982 through 1984, the Florida Department of Law Enforcement (FDLE) developed a series of operations intended to intercept illegal drugs on state highways. As part of the operation, FDLE officials proposed to set up temporary checkpoints along highways to stop all traffic and expose the cars to narcotic sniffing dogs. Because the FDLE has no authority to establish roadblocks, it asked for the assistance of the Florida Highway Patrol (FHP) to set up drivers' license checkpoints. FDLE officials also requested the assistance of K-9 units, each consisting of a narcotic sniffing dog and its handler, form the cities of Maitland, Lakeland, and Largo, Florida.

The joint operation plan, entitled "Interdiction of Illegal Narcotics, North Florida," called for roadblocks from 4:00 p.m. until 10:00 p.m. on January 11 and 12, 1984, at specific sites on four Florida highways near the Georgia state line. Six FHP troopers, one FHP investigator, five FDLE agents, and four or five K-9 units were assigned to each site. At a pre-operation briefing, all participants were given a copy of the Operation Plan and instructed about their respective responsibilities. The FHP troopers were responsible for traffic control and for stopping vehicles, checking obvious safety defects, and examining drivers' licenses and vehicle registrations. They were instructed to stop all traffic passing through the roadblocks until traffic

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[19] At a motions hearing before the district court, the parties told the court that no factual disputes existed and that the case could be decided by summary judgment.

became congested, in which case vehicles were to be waved through as necessary to avoid long backups.

The dog handlers were told that the outside of each car was to be sniffed by the dogs as FHP troopers checked the driver's license and vehicle registration. If a dog alerted to the presence of drugs or if license or registration problems were found, the car was directed to a location out of the flow of traffic. In the case of a dog alert, a second dog was supposed to check the outside of the car. If the second dog alerted, consent to search was requested; and, if refused, the driver was detained until a search warrant was obtained. FDLE agents worked with the dog handlers and were responsible for making decisions about vehicle searches if a dog alerted to the presence of drugs.

Other teams–each consisting of an FDLE agent, an FHP trooper, and K-9 unit–were directed to walk around vehicles parked in nearby rest areas and truck stops. If the dogs alerted, the driver was to be located and asked for consent to search.

During the operation, the Florida Department of Transportation set up traffic control devices including cones, warning signs, and flashing lights to direct motorists to the checkpoints. During the two day operation, approximately 2100 vehicles passed through the roadblocks of which roughly 1330 were stopped. With the vehicles checked by teams at the rest areas and truck stops, approximately 1,450 vehicles were sniffed by the dogs. The dogs alerted to 28 vehicles; and, after a full search, only one person was arrested for possession of illegal narcotics. In addition, law enforcement officials issued sixty-one vehicle-related citations.

At the roadblocks, the actual encounter with the officers conducting the drivers' license checks lasted a few minutes. And, the dogs usually were able to sniff the exterior of the cars before the license and registration checks were completed. So, most people experienced only a slight delay. But, during rush hours, traffic backed up; and some

people waited thirty to forty-five minutes before arriving at the roadblock or being waved through. In general, vehicles were permitted to leave the lines approaching the roadblocks and to turn around, but not without first being stopped by a trooper and having their registrations and drivers' licenses checked. Still, in at least one instance, a driver was instructed to remain in the line. People whose vehicles were actually searched experienced longer delays. In addition, one car overheated; one minor accident occurred; the dogs scratched several cars; and one person was bitten by a dog.

Plaintiffs, a class of motorists stopped at the roadblocks, brought suit against state and local officials involved in the operation. Plaintiffs say the checkpoints violated their Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures. Plaintiffs specifically sued defendants Robert Dempsey, the Commissioner of FDLE during the operation, and Robert Butterworth, the Director of the Florida Department of Highway Safety at the time, in their individual capacities, seeking compensatory and punitive damages. Plaintiffs also sued the police departments for the Florida cities of Lakeland, Maitland, and Largo and their Chiefs of Police for compensatory and punitive damages. In addition, plaintiffs sued the current Commissioner of FDLE, James Moore, and the current Director of the Department of Highway Safety, Fred Dickinson, in their official capacities, seeking declaratory and injunctive relief to prevent the state from conducting future roadblock operations.

The district court disposed of the case through a series of orders. First, the court dismissed the claim against the police chiefs and their city police departments on the grounds that the chiefs had not "knowingly conspired" to violate plaintiffs' rights and that the facts did not support imposing municipal liability. Next, the court addressed the merits of plaintiffs' constitutional claims and concluded that the operation, as planned, violated no constitutional rights.

In a later order, the court granted defendants Butterworth and Dempsey qualified immunity on the grounds that, at the time of the roadblocks, it was not clearly established that the operation violated plaintiffs' constitutional rights. The court also dismissed the claim against Moore and Dickinson because the planned operation did not–and in the future will not–authorize unconstitutional conduct.

The district court's orders contain no reversible errors of law. Everything stated in those orders will not be restated in this opinion; instead, we write to emphasize and to clarify some points raised by this case.

At the outset, plaintiffs contend that the State of Florida conducted the roadblock operation at issue for the purpose of exposing the cars to the drug sniffing dogs. So, plaintiffs claim the operation was an invalid pretextual seizure. We disagree.[20] That the chief (but not sole) purpose of the

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[20] For roving traffic patrol officers, this court has held that pretextual stops may violate the Constitution. We have said, in that context, the important question is, not whether some officer could have lawfully made the stop, but whether a reasonable officer would have made the stop in the absence of the illegitimate motive. See *United States v. Smith*, 799 F.2d 704, 708 (11th Cir.1986). But see *United States v. Hassan El*, 5 F.3d 726, 731 (4th Cir.1993) (rejecting Eleventh Circuit pretextual analysis and adopting "purely objective test" used in majority of circuits under which a stop is not invalid pretext as long as an officer could have made the stop).

Defendants have not tried to conceal the purposes of the roadblocks. That the chief (but not sole) purpose of the roadblocks in this case was to intercept drugs is undisputed. And, the Smith pretextual analysis pressed on us by plaintiffs does not control this case because a stop at a checkpoint such as a roadblock is fundamentally different from the roving patrol stops at issue in Smith and those decisions following that case. Those cases involve field-level law enforcement acts by individual officers acting on their own discretion. Smith indicates the unconstitutional act occurs when an officer selectively targets a particular person based on the officer's subjective belief, not amounting to probable cause, that the person engaged in unlawful conduct other than a traffic violation.

As the Supreme Court has noted, roadblocks are different from roving

roadblocks in this case was to intercept drugs is undisputed. That the state had the authority to conduct roadblocks to check drivers' license and vehicle registration is also undisputed. We conclude that, where the state has one lawful purpose sufficient to justify a roadblock, that the state also uses the roadblock to intercept illegal drugs does *not* render the roadblock unconstitutional. In other words, we adopt a totally objective rule: a state may conduct a mixed-motive roadblock as long as one purpose presented for the roadblock could validly justify the roadblock, even if no roadblock would have been put in place but for the state's desire to hunt for unlawful drugs.[21]

Our holding that the state of Florida, in principle, has the authority to conduct some roadblocks, at which drugs are sought, does not conclude our consideration of this

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patrols. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (distinguishing roving patrol stops and roadblock stops, in part, because roadblocks limit officer's discretion); *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660 (1979) (recognizing that roadblocks avoid "standardless and unconstrained discretion" present in individual stops). At roadblocks, the stop involves no individual discretion of officers in the field. State law enforcement decision-makers decide as a policy matter to conduct the operation. And, everyone traveling on the road at the time of the operation is stopped and subjected, at least initially, to the same investigation. So, one officer's individual discretion does not affect the determination of who is stopped. Because police officer discretion is not at the heart of the roadblock stop, no selective targeting occurs; and, the pretext analysis, as set out in our precedents, does not fit the roadblock case. We think a different rule is justified, and we will not extend those precedents to these circumstances.

[21] Courts have upheld the use of roadblocks to check drivers' licenses and vehicle registrations, *United States v. McFayden*, 865 F.2d 1306 (D.C.Cir.1989); to prevent the entry of illegal aliens, *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); and to check for drunk drivers, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), on the grounds that each was a valid state interest. No question is presented about whether a state can lawfully conduct a roadblock solely to intercept illegal drugs; and we leave that question open.

operation's constitutionality. Next, we must consider whether this operation–as planned or in the reality of its performance–violated plaintiffs' constitutional rights; that is, whether these roadblocks were reasonable in the light of the state's interest in conducting the roadblocks, the effectiveness of the operation in promoting that interest, and the level of intrusion on the individual's privacy caused by the checkpoints. *See Brown v. Texas*, 443 U.S. 47, 49-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979). At least to the extent the operation was conducted to ensure compliance with the state's driver licensing and vehicle registration laws, the operation advanced an important state interest. *See Delaware v. Prouse*, 440 U.S. 648, 657-58, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979).[22] And, that the operation's actual vehicle citation rate was 4.6%, significantly higher than the rates found acceptable in *Martinez-Fuerta* and *Sitz*, shows that the operation, as performed, effectively advanced the state's interest.[23]

Pursuant to the operational plan, no motorist was to be detained at the checkpoint–that is the location where the motorist encountered the officers–for longer than the time required to conduct a driver's license and registration check. The dogs were to circle the exterior of the car while the officers conducted the document inspection. So, the plan called for motorists to experience only a slight delay once they reached the checkpoint. Nothing in the record indicates that, during execution of the plan, motorists were detained at the checkpoint for longer than this anticipated delay.[24] The Supreme Court has upheld the

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[22] Plaintiffs argue that the purpose of finding illegal drugs is not related to the state's interest in highway safety. Again, the state has identified one legitimate state interest–license and registration enforcement–advanced by the operation; so, we need not consider other reasons motivating the state to conduct the operation.

[23] This percentage reflects the citation rate for vehicles checked at the roadblocks.

[24] Records of the time required to conduct the document inspection

constitutionality of brief roadblock seizures that lasted about twenty-five seconds at a sobriety checkpoint, *see Sitz*, 496 U.S. at 444-56, 110 S.Ct. at 2483-88, and seizures that lasted 3 to 5 minutes at an immigration checkpoint away from the border. *See Martinez-Fuerte*, 428 U.S. at 544-48, 96 S.Ct. at 3077-78. So, in this case, we believe the slight delay required to conduct the license check was no unreasonable delay.[25]

State planners anticipated the possibility of traffic backing up at the roadblocks; so, they instructed officers to wave cars through the checkpoints as necessary to avoid congestion. But, the record indicates that the officers on the spot did not always respond quickly to changing traffic patterns and at times did not allow traffic to pass through as instructed. During rush hour, traffic became congested; and some people waited up to 45 minutes before reaching the checkpoint or being waved through. Whether these people were "seized" while they *waited to reach the checkpoint* and, thus, whether their delay should be considered in assessing the reasonableness of the operation, depends on whether they reasonably believed they were not free to turn around and to avoid the checkpoint. The clock for assessing the reasonableness of the delay caused by the checkpoint begins to run when a reasonable person would believe he cannot leave the line and avoid the

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were not kept. But, statements by troopers conducting the stops, as well as a video tape of vehicles stopped at the roadblock on U.S. Highway 19, suggest that the document inspection and external sniff were often conducted in less than one minute.

[25] Drivers were directed to the side of the highway when a dog alerted to the presence of illegal drugs in their cars. These drivers experienced longer delays as a second dog sniffed their cars or their cars were searched or both. But, as the lower court held, an alert by a narcotics trained dog establishes probable cause to believe a car contains illegal narcotics. *See United States v. Dovali-Avila*, 895 F.2d 206 (5th Cir.1990). So, the additional delay suffered by these people did not violate the Constitution. The delay suffered by people cited for license and registration violations also was not unconstitutional.

checkpoint. *See United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Governmental officials must pay special attention to traffic back-ups at roadblocks; this circumstance carries with it the greatest potential for constitutional violations and for liability for the violations.

Nothing in the record indicates that many or most waiting drivers believed they could not leave the line. In fact, the record indicates that, in general, drivers were permitted to leave the line, but not without first being stopped by a trooper, having their license and registration checked, and perhaps having their vehicles sniffed by dogs. Assuming the resulting delay to these drivers (the ones who left the line) was no more than a few minutes–and we have no evidence to the contrary, these motorists were not seized for an unreasonable period of time.[26] But, at least one motorist was told that he could not leave the line. This motorist was seemingly seized during the entire 20 minutes he was required to remain in the line.[27] Such delay seems too long and, given the circumstances, might violate the Constitution. But, no other violations are supported by the record.[28]

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[26] At the rest areas and truck stops, each of the cars sniffed by the dogs was parked. No moving vehicles were stopped; and in the absence of an alert by a dog, vehicle operators were not detained. So, most of the conduct of the officers at the rest areas and truck stops did not constitute a seizure.

[27] We note that even this person, when his car overheated, was permitted ultimately to turn around and leave the line before reaching the actual roadblock.

[28] The record pertaining to whether people waiting in line believed they could turn around is not extensive. Officers conducting the roadblocks said that drivers were permitted to turn around and to avoid the checkpoint after being stopped and having their drivers' licenses and vehicle registrations checked. Out of the more than 2100 vehicles to pass through the roadblock, plaintiffs provide affidavits of only two drivers who attempted to turn around. And, both of these drivers were permitted to leave the line before reaching the checkpoint. One was

Plaintiffs contend that, regardless of the constitutionality of the roadblocks by themselves, the use of dogs to sniff the

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allowed to leave after being stopped and questioned; and the other, although originally told to remain in the line, was permitted to leave when he experienced car trouble. Plaintiffs provide no affidavits of drivers who wanted to turn around but believed they were required to remain in the line and, therefore, remained in line until they reached the checkpoint.

In addition, plaintiffs claim that the presence of a trooper in a "chase" car stationed behind the cars approaching the roadblock suggests that a reasonable person would not believe he could turn around. But, we think this circumstance is not probative. The presence of the chase car just as likely assures motorists that they can expedite their confrontation with law enforcement by turning around: a person waiting in line would know that he, without waiting to reach the roadblock, could talk to a police officer quickly if he needed or wanted to do so. And, the record indicates that the chase car is stationed by police at the back of the line because, in the light of their past experience, turn arounds are very common and expected at roadblocks. This practice and experience suggest that people waiting at roadblocks believe they are free to turn around.

Plaintiffs also claim that a reasonable person would not believe he was free to turn around for fear he could be prosecuted under Florida Statute section 316.1935. But, that statute makes it a crime for a person to evade or elude a police officer after having been ordered to stop. By its terms, the statute, to say the least, does not plainly apply to the line of traffic not yet at the roadblock; and no reported cases suggest that a motorist would violate Florida law by attempting to turn around before reaching the roadblock. Nothing in the record indicates that the State of Florida has a practice of prosecuting drivers under this statute for turning around at roadblocks. And, plaintiffs present the affidavits of no drivers who wanted to turn around but say they did not do so for fear of prosecution under the statute.

Also, nothing in the record suggests that the physical terrain prevented motorists from turning around. In fact, the record indicates that the highway medians in the areas of the roadblocks were flat and dry, thus, facilitating attempts to turn around.

In district court, plaintiffs stated that the record was sufficient to decide their claims on summary judgment. But, plaintiffs have failed to produce the kind of evidence in the record which would permit a fact finder to find that a reasonable person would believe he was not free to turn around.

exterior of their cars without an individualized reasonable suspicion of drug-related criminal activity amounted to an unconstitutional search. In *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the Supreme Court determined that, because a canine sniff of a person's luggage indicated only the presence or absence of contraband, the canine sniff was only minimally intrusive and was no "search" within the meaning of the Fourth Amendment. *Id.* at 706-09, 103 S.Ct. at 2644-45.[29]

Here, the dogs sniffed the exterior of plaintiffs' vehicles; they did not invade plaintiffs' homes or their bodily integrity. The sniffs occurred while plaintiffs were lawfully stopped in a public place; and because the sniffs occurred during the license check, plaintiffs were not delayed to conduct the sniffs. The sniffs also alerted the officers only to the potential presence of drugs; they did not expose the contents of plaintiffs' vehicles to public view. (And, the privacy interest in possessing illegal drugs is not one that society recognizes as reasonable. *United States v. Jacobsen*, 466 U.S. 109, 121-25, 104 S.Ct. 1652, 1661-62, 80 L.Ed.2d 85 (1984).) As in *Place*, the external sniff of plaintiffs' vehicles was not a search within the meaning of the Fourth Amendment.[30] So long as the use of the dogs did not make

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[29] Plaintiffs argue that the Court's holding in *Place* should be limited to sniffs of *unattended* property and that this court should follow the reasoning of the Second Circuit in *United States v. Thomas*, 757 F.2d 1359 (2d Cir.1985), which held that a dog sniff outside a person's apartment was a search requiring Fourth Amendment protection. *Id.* at 1367.

We reject plaintiffs' claim. A person's privacy interest in his automobile on a public road is less than a person's privacy interest in his residence. The use of the dogs on the exterior of the cars constitutes no search. *See United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.1993) (sniff of vehicles exterior no search); *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir.1990) (same); *United States v. Rodriguez-Morales*, 929 F.2d 780, 788 (1st Cir.1991) (same).

[30] In a similar way, the rest areas are public places; and the truck stops, although private, were checked with the consent of a manager. So, the

the delay caused by the roadblocks unreasonable–and we have no evidence to the contrary, the state's decision to use dogs at the roadblocks does not make the operation unconstitutional.

In summary, the balance of the state's interest in enforcing its license and registration requirements, the extent to which the roadblocks furthered that interest, and the degree of intrusion on individual motorists who experienced only slight delays weigh in favor of the state program. We therefore hold that the operation, as planned, did not violate the Constitution. And, in the case of most motorists, the roadblocks were in reality conducted consistently with the Fourth and Fourteenth Amendments. But, in the limited instances of motorists who were delayed for significantly more than the brief time it took to conduct the license check and who were told they could not turn around and leave the line before reaching the roadblock, the roadblocks could constitute an unreasonable seizure.

Our conclusion that at least one motorists might have suffered constitutional deprivation does not entitle plaintiffs to relief against defendants. The supposed constitutional violation–an unreasonable delay–occurred when, in violation of the official plan, individual officers (who are not defendants here) failed to let traffic pass through the roadblocks. Defendants Dempsey and Butterworth cannot be held vicariously liable for unauthorized acts of their subordinates: the doctrine of respondeat superior is unavailable under section 1983. *See Monell v. Department of Social Services*, 436 U.S. 658, 691-92, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).[31]

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use of the dogs on the exterior of cars parked at these places did not constitute a search.

[31] And, because the operation violated no clearly established law, Dempsey and Butterworth are entitled to qualified immunity in their individual capacities. *Lassiter v. Alabama A & M University*, 28 F.3d 1146 (11th Cir.1994).

The judgment of the district court is AFFIRMED.[32]

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[32] Plaintiffs also seek prospective relief against defendants Moore and Dickinson to prevent the use of similar roadblocks in the future. Because the roadblock plan is not unconstitutional on its face, plaintiffs lack standing to bring a claim for prospective relief. *See Kerr v. West Palm Beach*, 875 F.2d 1546, 1553-54 (11th Cir.1989).

The city police chiefs' mere acquiescence in what appeared to be a legitimate state act is insufficient to find that they conspired to establish the roadblocks. *See Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir.1983). And, because no city officials made specific choices about a course of conduct during the operation, municipal liability cannot be imposed on the city defendants. *See Pembaur v. Cincinnati*, 475 U.S. 469, 480-84, 106 S.Ct. 1292, 1299-1300, 89 L.Ed.2d 452 (1988).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2510

JOHN M. MERRETT, SOLOMON CLAYTON, CECELIA A. CLAYTON,

Plaintiffs-Appellants,

versus

JAMES T. MOORE, Commissioner, FDLE, LEONARD MELLON, Exec. Director, Florida Dept. of Highway Safety & Motor Vehicles, LAWRENCE CROW, Chief, Lakeland Police Dept., JERALD VAUGHN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by Appellants John M. Merrett, Cecelia A. Clayton, and Solomon Clayton is DENIED.

The panel was aware that the Tenth Circuit reached a different result in a somewhat similar case: United States v. Morales-Zamora, 974 F.2d 149 (10th Cir. 1992). We were not persuaded by that opinion.

United States Court of Appeals,

Eleventh Circuit.

No. 93-2510.

John M. MERRETT, Solomon Clayton, Jr., Cecelia A. Clayton, Plaintiffs-Appellants,

v.

James T. MOORE, Commissioner, FDLE, Leonard Mellon, Exec. Director, Florida Dept. of Highway Safety & Motor Vehicles, Lawrence Crow, Chief, Lakeland Police Dept., Jerald Vaughn, Defendants-Appellees.

Feb. 26, 1996.

Appeal from the United States District Court for the Northern District of Florida (No. TCA 84-7198-WS); William Stafford, Judge.

ON PETITION FOR REHEARING EN BANC

(Opinion July 25, 1995, 11th Cir., 58 F.3d 1547)

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

BARKETT, Circuit Judge, dissenting, in which KRAVITCH and HATCHETT, Circuit Judges, join:

I respectfully dissent from the court's denial of *en banc* rehearing in this case, which makes us the first circuit court in the country to legalize roadblocks to intercept illegal drugs. Such a case deserves careful consideration by the entire court.

Heretofore, federal courts have allowed very few exceptions to the Fourth Amendment requirement that law enforcement officers possess at least articulable suspicion before stopping a vehicle: namely, at fixed checkpoints near border crossings to preclude illegal immigration, *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-67, 96 S.Ct. 3074, 3086-87, 49 L.Ed.2d 1116 (1976); and at fixed and temporary checkpoints to ensure compliance with *traffic-related laws*, such as driver license, vehicle registration and drunk driving laws, *see Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455, 110 S.Ct. 2481, 2488, 110 L.Ed.2d 412 (1990); *United States v. McFayden*, 865 F.2d 1306, 1313 (D.C.Cir.1989).

This case, however, upholds temporary, unannounced roadblocks established on the pretext of ensuring compliance with traffic-related laws, but admittedly designed to intercept illegal drugs. While law enforcement officers checked driver licenses and

vehicle registrations at the roadblocks, other officers walked drug dogs around the vehicles to sniff for illegal drugs. Motorists could not leave the line leading up to a roadblock without being chased down by an officer and subjected to a license and registration check and a drug-dog sniff of their vehicles. Illegal drugs were found in only one of the 1300 vehicles stopped.

During prohibition seventy years ago, the Supreme Court observed that "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile *on the chance of* finding liquor...." *Carroll v. United States*, 267 U.S. 132, 153-54, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925) (emphasis added). In my view, permitting law enforcement officers to stop every vehicle at a roadblock based on the mere possibility that one or more of the vehicles passing through will contain illegal drugs–evidence of a crime completely unrelated to highway safety–is similarly intolerable and unreasonable. The *en banc* court should carefully consider the ramifications of extending the roadblock exception to permit such roadblocks.

Likewise, the entire court should consider the following conclusions underlying the opinion:

I. A roadblock established on the pretext of ensuring compliance with traffic-related laws, but admittedly designed to intercept illegal drugs, is not unreasonably pretextual and therefore unconstitutional;

II. The reasonableness of a roadblock seizure can be determined under the balancing test of *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), without giving any consideration to the roadblock's primary purpose–the interception of illegal drugs–or to

the roadblock's effectiveness, or lack thereof, in serving that purpose; and

III. A motorist in a line leading up to a roadblock is not "seized" under the Fourth Amendment, where a law enforcement officer in a patrol car is visibly positioned to, and does, chase down motorists who leave the line, and subjects the motorists to a license and registration check and the car to a canine sniff.

I

The panel holds that "where the state has one lawful purpose sufficient to justify a roadblock [such as a license and registration check], that the state also uses the roadblock to intercept illegal drugs does *not* render the roadblock unconstitutional." *Merrett v. Moore*, 58 F.3d 1547, 1550-51 (11th Cir.1995). Under our longstanding precedent, however, when a law enforcement officer stops a car on the basis of a traffic violation to investigate the possibility that the car is carrying drugs, the stop is unconstitutional if a reasonable officer *would not have made the traffic stop* in the absence of the illegitimate motive. *See, e.g., United States v. Valdez*, 931 F.2d 1448, 1451 (11th Cir.1991); *Amador-Gonzalez v. United States*, 391 F.2d 308, 313 (5th Cir.1968).

In this case, the government conceded that it would not have established the roadblocks absent its desire to intercept drugs. The panel, however, finds our pretext cases inapplicable because they involved roving rather than roadblock stops. The panel reasons that because "one officer's individual discretion does not affect the determination of who is stopped [at roadblocks] ..., the pretext analysis, as set out in our [roving patrol] precedents, does not fit...." *Merrett*, 58 F.3d at 1550 n.

2.

Police officer discretion is not the primary concern of our pretext cases, however. While these cases recognize the danger posed by the discretion exercised by officers on roving patrol, they are grounded on the more fundamental concern that officers will attempt to evade the requirements of the Fourth Amendment by using a traffic stop to detain someone for a purpose that would not lawfully support a detention. In both cases, "the police engage[ ] in a deliberate scheme to evade the requirements of the Fourth Amendment...." *Amador-Gonzalez,* 391 F.2d at 314 (quotation omitted). Moreover, the problem with discretion continues to exist with roadblocks, but at a higher level. A discriminatory purpose easily could lead to the establishment of roadblocks at the ingress or egress to particularly unfavored neighborhoods.

Although the Supreme Court has not directly considered the question of pretextual stops, it has indicated that this type of roadblock is unreasonably pretextual and therefore unconstitutional. In *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), the Court reviewed a decision where a court had suppressed evidence seized at a roadblock on the ground that the officer had to change his position in order to see the evidence, allegedly rendering the plain-view doctrine inapplicable. *Id.* at 734-35, 103 S.Ct. at 1539-40. Holding that the plain view doctrine did apply, the Court emphasized that there was "no suggestion that the roadblock was a pretext whereby evidence of [a] narcotics violation might be uncovered in "plain view' in the course of a check for driver's licenses." *Id.* at 743, 103 S.Ct. at 1544; *see also South Dakota v. Opperman,* 428 U.S. 364, 376, 96 S.Ct.

3092, 3100, 49 L.Ed.2d 1000 (1976) (upholding inventory search because "there is no suggestion whatever that this standard procedure ... was a pretext concealing an investigatory police motive").

As the Tenth Circuit explained in *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir.1992), when considering a roadblock identical to the ones before us, "[i]t would seem to follow [from the opinion in *Texas v. Brown*] that had the roadblock [there], which was designed to check for driver's licenses and registration, been but a pretext to look for "plain view" evidence of more serious crimes, the seizure of the [evidence] would have constituted a violation under the Fourth Amendment." *Id.* at 152. Applying *Brown*, the court reasoned as follows: "[h]aving concluded that the primary reason for the roadblock stop of Zamora's car was not to check her driver's license, but to ascertain, with the aid of an ever-present sniffing canine, whether she possessed drugs, it follows that the stop was pretextual and all that occurred thereafter was tainted." *Id.* at 153; *see also McFayden*, 865 F.2d at 1312-13 (observing that driver license roadblock could be conducted in a way indicating that its principal purpose was to detect crimes unrelated to licensing, in which case "a subterfuge might result in an infringement of Fourth Amendment rights").

II

The panel also holds that the roadblock seizures were reasonable under the test set forth in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Under this test, the reasonableness of a seizure is determined by balancing "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the

severity of the interference with individual liberty." *Id.* at 51, 99 S.Ct. at 2640. The Supreme Court has explained that "[w]hat is reasonable, of course, depends on *all* of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 619, 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639 (1989) (emphasis added; quotation omitted).

In determining the reasonableness of the roadblock seizures, however, the panel does not consider *all* of the circumstances surrounding the seizures. Instead, it focuses *exclusively* on the driver license and vehicle registration aspects of the roadblocks, that is, on the public's interest in ensuring compliance with license and registration laws and on the roadblock's effectiveness in advancing that interest. *See Merrett,* 58 F.3d at 1551-53. By ignoring the primary purpose of the roadblocks–intercepting illegal drugs–and the ineffectiveness of the roadblocks in serving that purpose, the panel, in my view, fails to engage in a meaningful balancing under *Brown* and *Skinner,* and loses sight of the historical concern with protecting citizens from wholesale governmental searches and seizures in the absence of probable cause or reasonable suspicion.

III

Finally, the panel concludes that the intrusiveness of the roadblocks was minimal, largely because it finds that the motorists were "seized" only after they reached the front of the line leading up to the roadblocks. The motorists were seized while *waiting* in line, however, if "the police conduct would have communicated to a reasonable [motorist] that the [motorist] was not free" to leave the line. *Florida v. Bostick,* 501 U.S. 429, 439,

111 S.Ct. 2382, 2389, 115 L.Ed.2d 389 (1991); *United States v. Mendenhall*, 446 U.S. 544, 551-55, 100 S.Ct. 1870, 1875-78, 64 L.Ed.2d 497 (1980).

The evidence showed that before reaching the actual roadblocks, some motorists waited in line for up to forty-five minutes (during rush hour) with no viable alternate routes and an officer in a chase car positioned to stop any motorist attempting to leave. The evidence further showed that motorists who left the line were stopped by an officer and subjected to license and registration checks and drug-dog sniffs of their cars. It seems pretty clear to me that this evidence, viewed in the light most favorable to the motorists, supports a finding that a reasonable motorist would not have felt free to leave the line.

The panel reasons that the presence of the chase car "just as likely assures motorists that they can expedite their confrontation with law enforcement by turning around." *Merrett*, 58 F.3d at 1552 n. 10. *Expediting* the encounter, however, is not the same as *ending* the encounter. In my view, freedom to leave the line means freedom to leave the line without being stopped. *See Bostick*, 501 U.S. at 439, 111 S.Ct. at 2389 (emphasizing that defendant may not have been seized because he might have felt free to "terminate the encounter"); *Mendenhall*, 446 U.S. at 555, 100 S.Ct. at 1878 (finding no seizure where defendant had no reason to believe "she was not free to end the conversation [with law enforcement officers] ... and *proceed on her way* ") (emphasis added). Thus, a reasonable factfinder could find that the motorists were seized not only at the roadblock, but also while waiting in line, significantly increasing the intrusiveness of the seizures.

I believe the panel further minimizes the intrusiveness of the roadblocks by limiting its intrusiveness analysis to the stop's duration. In *Sitz*, the Supreme Court confirmed that a stop's intrusiveness on motorists' privacy interests is not limited to the duration of the stop, but includes "the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Sitz*, 496 U.S. at 452, 110 S.Ct. at 2486; *see also Skinner*, 489 U.S. at 619, 109 S.Ct. at 1414 (holding that reasonableness of seizure depends on *all* surrounding circumstances). The temporary, unannounced roadblocks in this case were set up in such a way that motorists could not avoid an encounter involving numerous officers handling aggressive police dogs; indeed, at least one motorist was attacked by a dog. The panel's analysis, however, does not consider the fear and surprise that such a sight would engender in a law-abiding motorist.

IV

As the Supreme Court has observed,

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion

> every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Delaware v. Prouse, 440 U.S. 648, 662-63, 99 S.Ct. 1391, 1400-01, 59 L.Ed.2d 660 (1979). In my view, this opinion comes perilously close to permitting unfettered government intrusion on the privacy interests of all motorists. For this reason and those discussed above, I would grant rehearing *en banc*.